

A Reference Guide to the New Family Court Rules **by Hon. Norman J. Davis**

We all know by now that the Arizona Supreme Court has approved new *Arizona Rules of Family Law Procedure* effective January 1, 2006. The new rules apply to all family court cases filed after that date, as well as to all cases pending at that time with two exceptions. Under the first exception, Rule 2(B) that relaxes the *Arizona Rules of Evidence* is inapplicable to family law cases filed prior to January 1, 2006 absent stipulation to its applicability. The second exception applies to pending cases in which disclosure was previously made pursuant to Rule 26.1, *Arizona Rules of Civil Procedure (ARCP)*. In such cases, no further disclosure is required beyond the duty to seasonably supplement the earlier disclosure.

The new family court rules were designed to reduce the harm to families and children that is inherent in civil litigation, to more closely fit the needs of families in conflict, to simplify and reduce unnecessary delays in court proceedings, and to bring a less adversarial and more problem-solving approach to family disputes.

Although the Committee on Rules of Procedure in Domestic Relations Cases was established by the Supreme Court to accomplish these goals by drafting new family law rules, the Committee had no desire to make wholesale changes to the civil rules simply for the sake of change. Indeed, years of research, debate, and drafting by many eminent legal scholars at the national and state levels went into the creation and evolution of the civil rules. Much discussion by the Committee focused on the need to stay true to concepts in the civil rules where it made sense to do so, and to reap the concomitant benefit of literally thousands of past and future appellate decisions interpreting these rules.

Consequently, it will come as no surprise that significant blocks of the civil rules are left unchanged in the new family law rules, and that others have been only slightly modified. New family law rules that heavily rely on the civil rules include those governing the computation of time (Rule 4), motions to dismiss (Rule 32), motion practice (Rule 35), parties (Rules 36–39), service of process (Rules 40–43), entry of default (Rule 44), discovery procedures (Rules 51–65), judgments, summary judgment, declaratory judgments, entry of judgment, findings of fact, motions for new trial, motions to alter or amend a judgment or decree, motions to correct mistakes, and motions for relief from a judgment or decree (Rules 78–85).

Although there is no substitute for studying the new rules in detail until they are as familiar as the civil rules, this task will be made easier by the parallel nature of the civil and family court rules. Moreover, where significant changes have been made, the corresponding civil rule often served as the template.

It is important to recognize that significant flexibility was intentionally drafted into the rules. The Committee recognized from the beginning that new Family Court Rules must meet the needs of both the large urban courts, as well as the smaller rural courts. With the burgeoning population of self-represented litigants bringing their cases to Family Courts statewide, the Committee also understood the need to draft rules to efficiently hear cases filed by those unfamiliar with legal

process, as well as to preserve legal procedures that better meet the rigorous demands of more complex cases with attorney representation. Thus, some rules provide for a variety of options for the court and/or the parties to utilize. Furthermore, certain rules have been made permissive to accommodate the varying needs and resources available in each court in the state. In addition, an effort was made by the Committee to examine and adopt some of the best practices and procedures currently in use throughout the state. Counsel and parties in some counties may experience significant change in procedures adopted into the statewide rules from the best practices currently in place in another county, with little or no change being noticeable in the county of origin.

Errors and inconsistencies are inherent in a rule revision project of this magnitude. Some have already been identified. To accommodate this reality, the Arizona Supreme Court formed a Family Law Rules Review Committee on November 29, 2005 to recommend revisions and amendments to the new rules over the next two years.

So if many of the civil rules survived intact or with only minor changes, and if the job of refining the new rules won't be fully accomplished for a number of years, what's so great about these new rules? Just what will change in the near future for litigants, attorneys and the court operating under the new procedures that will improve the lives of families and children in Arizona?

At the risk of oversimplifying and ignoring more important concepts in the new rules, and with the knowledge that the rigorous academic discussions engaged in by the Committee over the last two years in drafting the rules, indicate that it is unlikely that all members of the Committee would agree on what changes are most significant, let me hazard a few observations in this area.

In this context it might be helpful to look at how the new rules may affect five segments of a family law case:

1. At the start of a case when pleadings are prepared, filed and served;
2. When the case is uncontested because of full agreements reached or a default entered;
3. During pre-trial procedures preparatory to trial;
4. At trials and evidentiary hearings; and
5. Filing of post-decree and post-judgment proceedings.

Filing and Serving a Family Law Case

Although most of the rules applicable to filing and serving a family court case remain consistent with civil rules and concepts, there are a few significant changes that may be important to a family law attorney or party.

Petitions v. Motions. Historically, there has been some confusion whether to caption a pleading as a "Petition", "Motion", or even an "Application". While this may be a minor distinction, Rules 3 and 24 seek to avoid further confusion in this area by clearly defining a "Petition" as an "initial pleading that commences" either a family law case or a post-decree matter. A "Motion"

is a written request made after a petition is filed. Thus, a party would properly file a “Petition for Modification of Custody”, and a “Motion for Temporary Orders”.

Protected and Unpublished Addresses. In preparing a case for initial filing it may be important to protect a party’s address from disclosure because of the threat of harm to the party or the party’s minor child. Rule 7 allows a party “who reasonably believes that physical or emotional harm may result to the person or a minor child” to omit the party’s address from the pleadings or motion to be served and file a separate *Request for Protected Address* form (Rule 97, Form 15), and a proposed form of order with the court. If approved, subsequent service on the person whose address is protected is accomplished by delivering the documents to be served to the Clerk and paying the appropriate fee. The Clerk is required to mail the documents to the protected address by regular first-class mail and file a verification of the mailing. A party requesting the protection of this procedure is under a continuing duty to provide the clerk a current and correct mailing address for service until the case is concluded with the entry of a final appealable order, judgment or decree and the time for appeal has expired or until the protected person’s address becomes known by the filing of a written notice of the address in the court file with a copy sent to all parties.

Limited Scope Representation. Rule 9(B) now specifically authorizes limited scope representation. For the first time an attorney will be authorized to represent a party with respect to only a portion of a family court case by the filing of a written form *Notice of Limited Scope Representation* (Rule 97, Form 1) stating that the attorney and the party have a written agreement for the attorney to provide limited scope representation and specifying the matter or issues for which representation will be provided. Such representation will make the attorney subject to service of all documents on behalf of the client, but will not thereby extend the attorney’s responsibility to represent the client in additional matters not specified in the limited scope agreement. At the conclusion of the representation, the attorney may withdraw from representation by filing a *Notice of Withdrawal of Attorney with Consent* signed by the attorney and the party. If consent of the party is not first obtained to withdraw, the withdrawal is accomplished by motion to the court. The withdrawal shall be permitted if the party files no objection within 10 days of service. If an objection is filed, a hearing on the objection is limited to the issue of whether the task agreed to by the attorney has been completed. This is an experimental rule and will expire on January 1, 2009, unless extended.

Third-Party Practice. The detailed counterclaim, cross-claim and third party practice rules of Rules 13 and 14, *ARCP* have been substantially revised in favor of a more basic rule. Rule 33 eliminates cross-claims altogether, and simply allows a party in a family law case to “file a statutory claim against another party, or against a third party arising out of or related to the subject matter of the action by the filing of a separate claim, counter-claim or third party petition, as appropriate without prior leave of court provided that said filing will not unduly delay or prejudice the adjudication of the rights of other parties to the action.” All other claims and requests for joinder, intervention, or interpleader require court approval.

Sensitive Data Form. To reduce the potential for identity theft, Rule 43(G) requires a party filing a family law case to omit or otherwise redact sensitive data (social security numbers, bank account numbers, credit card numbers, and other financial account numbers) from the filed

document, and file any such data required by the court on a separate *Confidential Sensitive Data Form* (Rule 97, Form 3).

Service of Process. In Title IV-D cases, Field Locate Investigators employed by the Department of Economic Security's Office of Special Investigations are now authorized to service process in IV-D actions initiated by the State. This change was included to reduce the delay occasioned when a party moved or avoided service between the time a Field Investigator located the party and an authorized process server actually served the party. Under Rule 40(E) the Field Investigator can effect personal service immediately.

Rule 41(C)(2) now authorizes personal service upon a party located within the state by certified mail, signed return receipt, or by any other national courier service that provides delivery and signature confirmation. Such service is only effective if the return receipt or signature confirmation is signed by the party to be served. Rule 42(C) also permits personal service upon an out-of-state party by national courier service in the same manner.

Rules 41(M) and 42(D) provide that service by publication does not confer *in personam* jurisdiction on the court to determine issues that traditionally required personal jurisdiction to adjudicate (paternity, child support, spousal maintenance, division of marital property). These rules distinguish family law cases from the contrary holding in civil cases set forth in *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70, 90 P.3d 1236 (App. 2004) in interpreting Rule 4.1, *ARCP*.

Uncontested Cases

Default Judgments by Motion. Motions to enter judgment by default under Rule 55(b)(1)(ii), *ARCP* have not been heavily used in the past, probably because the civil rules only permit their use in the limited circumstances when the parties had no minor children, owned no real estate, sought no spousal maintenance, had debt of less than \$10,000 and equity in community property less than \$15,000. These requirements are eased somewhat under new Rule 44(B)(1)(b) to eliminate the property and debt restrictions. Such motions now require only that the parties have no minor children and waive any right to spousal maintenance.

Default Hearings Following Service by Publication. Traditionally under Rule 55(f), *ARCP*, parties have been required to obtain and file a court reporter's written transcript following a default hearing when service occurred by publication. This created an additional expense and procedure for the parties regardless of whether the transcript was ever utilized. It also required the court to arrange for the presence of a court reporter or make arrangements to transcribe the electronic record from all such hearings. New Rule 44(F) will allow an electronic record to be filed in lieu of a written transcription.

Consent Decrees. Rule 45 will allow parties that agree to all of the terms of a family court settlement to submit a Consent Decree, Order or Judgment together with the necessary supporting documents to finalize the case without a court hearing after the passage of the applicable time periods and payment of the appropriate appearance fees. Maricopa County has utilized a similar process for many years authorized by local rule that included the requirement

of a lengthy stipulation requiring multiple initials and signatures. The new process will not require a separate stipulation, but will require the parties' signatures on the Decree, Order or Judgment be notarized or signed in the presence of a clerk of the court, and contain the specific information listed in Rule 45.

Involuntary Dismissal. Depending upon the policies and practices adopted in each county, the new rules may require parties and counsel to address issues and prepare each case earlier than in the past. If the parties fail to request a trial, hearing, or conference within 120 days of filing, Rule 46(A) allows the court to schedule the case for dismissal 60 days later unless such a request is filed. This rule should encourage the parties to address and resolve issues earlier and facilitate earlier intervention by the court. A significant number of family law litigants voluntarily dismiss their case, or allow the court to dismiss it as a result of reconciliation or similar reason. This rule will also allow such parties to exit the system earlier and remove further stress to the family caused by a pending litigation.

Pretrial Procedures

The most fundamental rule changes have occurred in the procedures that direct each family law case prior to trial. It is during this time period that the lives of the parties and their children may be the most unstable and uncertain. Not surprisingly, this is also the time when more damage may be done to the family if the case languishes without resolution or court intervention.

Temporary Orders. Requests for temporary orders have long been a part of family court, but the civil rules give little guidance on how such requests should be presented and heard. Rule 47 now clarifies that any temporary orders authorized by statute can be requested by the filing of a separate verified motion. The motion is required to contain the legal and jurisdictional basis for the motion, as well as the specific relief requested. The practice of some self-represented litigants of filing for temporary orders without also filing a petition for permanent relief is not authorized. A motion for temporary orders must not separately repeat allegations in the petition, but should incorporate them by reference. A motion for temporary orders will now also be required to include a specific proposed parenting plan if custody, parenting time or visitation is requested, a completed child support worksheet and disclosure documents if child support is sought, a specific amount and duration for any spousal maintenance request, and specific requests and information for temporary property, debt and attorneys' fees relief.

Temporary Orders Without Notice. The new rules do not include provisions for seeking an "emergency" order, but familiar concepts previously addressed in Rule 65(d), *ARCP* are included in Rule 48 as "Temporary Orders Without Notice". A slightly modified standard for seeking such orders is outlined, and the procedures to seek such an order, complete with the requirement for a hearing to be held within 10 days of the issuance of such an order, are closely aligned with the procedures in the civil rule.

Disclosure. An issue-dependent disclosure requirement is incorporated in Rule 49. Disclosure of specific relevant documents and information is required with respect to each issue that is in dispute. In addition, all parties are required to complete a standard written form *Resolution Statement* (Rule 97, Form 4 or 5) within 40 days of the filing of a response. This provision is

designed to resolve and narrow issues early in the case and avoid protracted discovery and litigation when such procedures are not necessary. In more complex cases, if a party believes more detailed disclosure is necessary, that party can require compliance with the broader disclosure requirements of Rule 26.1, *ARCP* by filing a notice requiring such compliance within 20 days of a responsive pleading.

Settlement and ADR. Settlement practices and alternate dispute resolution (ADR) procedures are encouraged and expanded in rules 66 through 75, consistent with the rules' premise that early intervention and opportunities for settlement reduce harm to families. Many changes are made in this area. For example, Rule 66(D) includes a requirement that the parties confer to consider ADR no later than 90 days after the first appearance of a respondent. Rule 66(E) imposes a duty upon all attorneys and unrepresented parties to attempt in good faith to settle or agree on an ADR process, and inform the court on a timely basis of their agreements or positions on specific ADR alternatives. The rules proscribe and encourage mediation, arbitration, settlement conferences, and other ADR processes outside of and within the court.

Resolution Management Conferences. The primary proceeding for the court to manage and resolve issues in a family law case is the Resolution Management Conference (RMC) authorized by Rule 76. This conference is required to be scheduled at the request of any party or it may be set on the court's own initiative. Two significant changes occur with the approval of this rule that should move cases closer to resolution early in the process and reduce the stress on families. First, Rule 76 requires the parties and counsel to take specific action designed to resolve or narrow issues in preparation for the RMC. Unless there is a current order prohibiting contact or a significant history of domestic violence, the parties and counsel are required to personally meet and confer to settle as many issues as possible at least 5 judicial days prior to the RMC. Also by that date all disclosure requirements must be completed. Further, each party is required to prepare and file a written *Resolution Statement* (Rule 97, Form 4 or 5) detailing a specific and detailed position that the party proposes to resolve each disputed issue without argument, inflammatory or otherwise, in support of the position.

A second substantive change will clearly allow the court to take a more direct and aggressive role in early settlement of issues. Rule 76(A)(3) specifically allows the court to "determine the positions of the parties on the disputed issues and explore reasonable solutions with the parties to facilitate settlement of the issues" at the RMC. These procedures were first piloted at the Northwest Regional Court Center in Maricopa County three years ago, and have been utilized more broadly by the entire Maricopa County Family Court over the last year with dramatic results. Using the RMC concept and other early management procedures included in the new rules, the total family court pre-decree caseload in Maricopa County has been reduced by nearly 29% over the last year without any accompanying decrease in the number of cases filed.¹ Removing these cases early from an adversarial system translates into a marked decrease in hostile court proceedings, and helps prevent further destruction of family relationships.

Setting a Case for Trial. The requirements of Rule 38.1, *ARCP* that proscribe the procedure to schedule a trial date have been simplified. The detailed certifications of a Rule 38.1 Motion to Set and the need for Controverting Certificates have been replaced in Rule 77 with a simplified Motion to Set process to request a trial date. The Motion to Set need only state when the case

will be ready for trial, the identifying information of the parties or their attorneys, the estimated time for trial, and whether the case is entitled to preference because custody is at issue. In addition, the court can schedule trial dates at a Resolution Management Conference or at other times determined by the court.

Trials & Evidentiary Hearings

Perhaps the biggest change in the new rules affecting how trials and evidentiary hearings are conducted occurred in the relaxation of the *Arizona Rules of Evidence*. The new rules also provide some guidance with respect to the presence of children in the courtroom and how the court conducts interviews of children.

Rules of Evidence. Traditionally, many family court proceedings have been conducted with a reduced reliance upon the strict application of the *Arizona Rules of Evidence*. Rule 2(B) formalizes this process by allowing the court to admit all relevant evidence. Evidence must still be excluded, however, if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence, lack of reliability or failure to adequately and timely disclose the evidence. Any party may opt out of this reduced standard and return to the use of the *Arizona Rules of Evidence* by filing a notice with the court at least 45 days prior to the hearing or trial requiring strict compliance with all or part of the *Arizona Rules of Evidence*.

The need for custodians of record to authenticate documents has also been reduced in all family court cases by the addition of Rule 2(B)(3). Under this rule records of regularly conducted activity as defined by Rule 803(6), *Arizona Rules of Evidence*, may be admitted into evidence in all cases without the custodian of the record if the document: 1) appears complete and accurate on its face; 2) appears to be relevant and reliable; and 3) is seasonably disclosed and copies are provided at time of disclosure to all other parties.

Similarly, Rule 2(B)(4) allows the court to consider as evidence any report, document, or standardized form required to be submitted to the court for the current hearing or trial if the document is either filed with the court or admitted into evidence. This change will permit the court to consider such documents as court-ordered drug testing results, reports from custody evaluators and from other experts appointed by the court, conciliation services reports, and standard form financial affidavits required for the hearing or trial. This change should reduce the occurrence of evidentiary issues outlined in *In Re Kells*, 182 Ariz. 480, 897 P.2d 1366 (App. 1995).

Presence of Children. Rule 11 confirms the common sense notion that most family law practitioners have lived by for years—minor children of the parties should not be brought to court without prior court permission.

Court Interviews of Children. Guidance has been provided to the court, counsel and parties with regard to interviewing minor children in custody and parenting time disputes. The subject of child interviews is limited by A.R.S. §25-405 to ascertaining the wishes as to the child's custodian and as to parenting time. New Rule 12 requires that, absent a stipulation of the parties

to the contrary, any child interview must be recorded by a court reporter or electronic medium. The record of the interview may be sealed for good cause after considering the best interests of the child. The parties may also stipulate that the record of the interview shall not be provided to the parties. To avoid confusion, unintended harm to a child, and due process issues, it may now be prudent for counsel and the parties to fully stipulate prior to any child interview as to the scope of the interview to be conducted by the court, whether the interview will be recorded as well as the appropriate medium of recording, and whether the record will be sealed or provided to the parties.

Post-Decree Proceedings

A major change in the rules is the addition of Rule 74 that will now govern all post-decree and post-judgment proceedings statewide and replace the current patchwork of various local rules adopted over the years to fill the gap in the civil rules.

General Provisions. Rule 91(A) is applicable to all post-decree and post-judgment proceedings, and generally requires all petitions to modify or enforce a prior family court order to be under oath, state the nature of the proceeding, the estimated time for the entire hearing, and the relief sought. All such petitions to modify or enforce must also set forth the pertinent portion of the prior order sought to be modified or enforced (or reference to a voluminous order that is impractical to include verbatim), the date of entry, and the name and location of the court that entered the order. All parties retain their designation as “Petitioner” or “Respondent” in all post-decree or post-judgment proceedings, regardless of the party filing the subsequent petition.

Orders to Appear. Rules 91(B),(C),(D),(E),(F),(G) and (H) outline the individualized requirements applicable to each specific petition to modify or enforce a prior order. With respect to all such petitions, excepting a petition to modify a prior custody order covered in Rule 91(D), an Order to Appear must be included for issuance by the court.

Petitions to Modify Child Custody. Rule 91(D) adopts a process to modify a prior child custody order that is closely aligned with a procedure that has been in place in Pima County for some time. In addition to the requirements listed in the Rule, Petitions to Modify Child Custody must contain a certification whether the underlying custody order or agreement contains a provision requiring the parties to pursue mediation or other alternate dispute resolution process prior to requesting court relief. Upon filing of the Petition to Modify Child Custody, a *Notice of Filing Petition for Modification of Child Custody* is issued by the Clerk to be served upon all persons entitled to notice who are required to file a response or controverting affidavits within 20 days of service. No sooner than 5 days after the time for filing a response expires, a party may submit a *Request for Order Granting or Denying Custody Hearing* to the assigned division. The court thereafter conducts a review of the submitted pleadings and affidavits to determine if adequate cause is presented in accordance with A.R.S. §25-411 to schedule a hearing on the Petition. The Petition is either denied or a conference or hearing is scheduled as appropriate.

The drafting of the *Arizona Rules of Family Law Procedure* by the Committee was a significant undertaking involving many, many hours of research, drafting and redrafting, work group sessions, committee meetings, discussions, debates, and significant travel for some members of the Committee. While the Committee was not unanimous in its adoption of every

rule, there was much more agreement than disagreement, and the Committee members were all united in the overall effort to improve the lives of Arizona families and children in crisis that find themselves in the Family Court. The new rules are probably too long and undoubtedly contain provisions that will prove themselves in need of some revision in the future. But for the first time in Arizona we have come together to manage family court disputes with rules that are written specifically with families and children in mind. We now have the ability to utilize the flexibility of these rules and improve them without sacrificing or diluting a needed procedure because it may not work very well in a tort, contract or other civil dispute. The future can only get better from here.

Hon. Norman J. Davis is currently the Presiding Judge of the Family Court in Maricopa County, and served as a Work Group Chair and Committee Member of the Committee on the Rules of Procedure for Domestic Relations Cases.

¹ The Maricopa County Family Court had a total of 19,596 pre-decree cases pending at the end of July 2004, compared to a total of 13,970 such cases at the end of November 2005.